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No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARTHUR MOATES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-5635

UNITED STATES OF AMERICA — Plaintiff-Appellee

v.

REYNIER EIRE — Defendant-Appellant

No. 86-5636

UNITED STATES OF AMERICA — Plaintiff-Appellee

v.

RICHARD WALTER NEELY, a/k/a Dickie — Defendant-Appellant

No. 86-5643

UNITED STATES OF AMERICA — Plaintiff-Appellee

v.

ARTHUR MOATES — Defendant-Appellant

No. 86-5644

UNITED STATES OF AMERICA Plaintiff-Appellee

v.

BENAE FLOYD Defendant-Appellant

No. 86-5648

UNITED STATES OF AMERICA Plaintiff-Appellee

v.

SOPHIA FLOYD Defendant-Appellant

Appeals from the United States District Court for the District of South Carolina, at Greenville. G. Ross Anderson, Jr., District Judge. (CR-86-92)

Argued: May 8, 1987 Decided: June 18,1987

Before RUSSELL and HALL, Circuit Judges, and VAN GRAAFEILAND, Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

Stephen J. Henry; Kenneth M. Robinson; James R. Mann for Appellants; John W. McIntosh, Assistant United States Attorney (Vinton D. Lide, United States Attorney; William C. Lucius, Assistant United States Attorney; Marcia A. Mason, Third Year Law Student on brief) for Appellee.

PER CURIAM:

In this action five persons appeal their convictions for conspiracy to possess cocaine with intent to distribute, 21 U.S.C. § 846; using the telephone in furtherance of their illegal drug activities, 21 U.S.C. § 843(b); and possession of cocaine with intent to distribute, 21 U.S.C. 6⅜ 841(a)(1). The appellants contend that the court made numerous errors in the admission of evidence, that it improperly failed to sever the trial of one appellant, and that the trial judge erred in not disqualifying himself at one appellant's sentencing hearing. We find that testimony regarding the conversations between appellant Sophia Floyd and Detective Atkins was improperly admitted under the coconspirator rule, but that this admission was harmless except as to appellant Neely. We find the remaining charges of error to be without merit.

I.

This case concerns a cocaine distribution ring that operated in the Greenville-Spartanburg area of South Carolina. The cocaine was brought up from Florida by Nelson Aguilar and allegedly sold to appellant Arthur Moates, who arranged for local distribution. The Drug Enforcement Administration (DEA) and Greenville police began investigating the operation in March 1984. Two years later, on March 10, 1986, they obtained an order to intercept wire communications on two telephone lines in Moates' service station in order to uncover members of the conspiracy who had not been susceptible to discovery through other investigatory techniques. The order named seven individuals, including Aguilar, Moates, and appellant Neely, and "others as yet unknown." The wire interception began on March 10, 1986, and terminated on April 9,

1986. Tapes of 19 of these calls were later admitted into evidence.

Two of the appellants are sisters – Sophia Floyd and Benae Floyd. Benae Floyd was Moates' "number one girlfriend" and allegedly had no prior connection to any drug trafficking, although she had been questioned about others' drug activities in the past. Sophia Floyd, on the other hand, was at least on the fringes of this conspiracy because she knew of the others' illegal activities. In October 1985, in order to earn some money and enlist the help of the DEA in obtaining a transfer for her boyfriend who was then serving time for an unrelated drug charge, Sophia Floyd initiated a meeting with Detective Atkins and offered to become his confidential informant. In this posture she reported to Atkins at least once each week about the drug-related activities of Moates, Neely, and others. She did not implicate herself in these reports. Her relationship with Atkins terminated on March 13, 1986, when an intercepted conversation between Moates and Sophia Floyd revealed that she was not just an observer, but was also an active participant in the conspiracy.

On May 7, 1986, a grand jury returned a 22-count indictment against the appellants and others charging one count of conspiracy, twenty counts of using the telephone in furtherance of drug activities, and one count of posession of cocaine with intent to distribute. Three of the defendants – Aguilar, Galano, and Sullivan – entered guilty pleas and testified on behalf of the government. The appellants were convicted of all charges against them on August 28, 1986.

II.

Benae Floyd appeals her conviction on the ground that the only evidence of her participation in the drug traffick-

ing activities was contained in intercepted wire communications that should have been minimized. Benae Floyd was Moates' girlfriend and she apparently talked to him by telephone several times each day. She was not included in the affidavit used to obtain the wiretap, she had no prior record of drug trafficking, and she was not a target or under investigation at the time the wire interception began. She contends that because her conversations with Moates for the first three days of the interception were innocuous, the government had no basis for continuing to listen to her calls. Rather, she argues, the government was required to minimize her conversations under 18 U.S.C. § 2518(5):

> . . . . Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.

The wire interception order in this case further specified:

> Even if one or more of the normal interceptees or their confederates, when identified is a participant in a conversation, monitoring will be suspended if the conversation is not criminal in nature or otherwise related to the offenses under investigation.

Despite the pattern of innocent conversations, the government continued to listen to Benae Floyd's calls and on March 13, 1986, they recorded a conversation implicating her in the drug activities.

In *United States v. Clerkley,* 556 F.2d 709 (4th Cir. 1977), *cert. denied,* 436 U.S. 930 (1978), we held that the government need not exclude all innocent conversations but must minimize unnecessary intrusions to the smallest

degree possible, invoking a standard of reasonableness on a case-by-case basis. *Id.* at 716. In analyzing a given case courts should consider (1) the nature and scope of the alleged criminal enterprise; (2) the government's reasonable expectation as to the content of, and parties to, the conversations; and (3) the degree of judicial supervision while the wiretap order is being executed. *Id.*

In the present case there is no allegation of insufficient judicial supervision. Benae Floyd merely argues that after three days of innocent conversation, the government had no reasonable expectation that she would begin talking about drugs. She further argues that although the government is afforded greater latitude when confronted with large narcotics conspiracies, *Clerkley* at 716, they still do not have carte blanche to engage in a fishing expedition.

Under the facts of this case we cannot say that the court abused its discretion in admitting these conversations. Benae Floyd had previously been questioned about unrelated drug activities, and this indicates a possible association with drug traffickers that reasonably gave the government additional time to evaluate the innocence of her intercepted conversations. Under such circumstances, the lapse of four days between the inception of the wiretap and the capture of an incriminating conversation was not excessive and did not violate the minimization requirement.

III.

The appellants next contend that the recordings of the intercepted conversations were obtained in violation of the fourth amendment and thus should have been suppressed. Specifically, they contend tha the affidavit supporting the intercept order failed to meet the requirements of 18 U.S.C. § 2518 because it did not give a "full and complete

statement" of prior investigatory efforts so as to show exhaustion of other modes of investigation. This contention is without merit. The government need not exhaust every conceivable technique before applying for a wiretap. *Clerkley* at 715. It may show either that traditional investigative techniques have been tried and failed, or it may show that they are unlikely to succeed. *Id.* The record shows that the government clearly did so in this case, explaining in sufficient detail the reasons why, after two years of probing into this drug ring, other investigatory techniques would be unsuccessful.

The appellants next raise a novel issue regarding the application of Fed. R. Evid. 801(d)(2)(E). Under this rule, the out-of-court statement of a conspirator is not hearsay when the statement was made during the course and in furtherance of the conspiracy, and thus may be used against his coconspirators. Based on this rule the court permitted Detective Atkins to testify about Sophia Floyd's out-of-court statements given to him when she was acting as a confidential informant. The appellants contend that Sophia Floyd's statements were hearsay and did not come within the exception of Rule 801(d)(2)(E) because, as a confidential informant for pay, she was not speaking in furtherance of the conspiracy when she talked to Atkins.[1] The record contains no analysis of the "in furtherance" requirement by the court below.

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[1] This case must be distinguished from those in which a coconspirator who has become an informant talks to a third party in his or her guise as a member of the conspiracy. In these situations the efforts of the coconspirator to induce the third party to engage in intercourse with the conspiracy clearly would be in furtherance of the conspiracy and thus would be admissible under Rule 801(d)(2)(E).

Case law has consistently mandated that coconspirator statements be in furtherance of the conspiracy. *See United States v. Nixon,* 418 U.S. 683, 701 (1974); *Anderson v. United States,* 417 U.S. 211, 218 (1974); *Dutton v. Evans,* 400 U.S. 74, 81 (1970); *Wong Sun v. United States,* 336 U.S. 440, 443-44 (1949); *see also United States v. Urbanik,* 801 F.2d 692 (4th Cir. 1986). Although Model Code Rule 508(b) and Uniform Rule 63(9)(b) eliminated the traditional requirement that the coconspirator's statement be in furtherance of the conspiracy, the drafters of Rule 801(d)(2)(E) rejected this change and retained the "in furtherance" requirement. *See* 4 *Weinstein's Evidence* § 801(d)(2)(E)[01] at 801-233-34 (1985). Their purpose was to strike a balance between the need to use conspirators' statements to combat a kind of criminal activity that is inherently secretive, and the need to protect defendants against inadvertent misrepresentations or deliberately falsified evidence. Therefore, to be admissible, the statement must advance an object of the conspiracy rather than thwart its purpose. Courts interpreting this requirement have scrupulously excluded certain kinds of statements from the coconspirator exception: idle chit-chat, mere bragging, descriptive comments, and statements deliberately inculpating other conspirators and knowingly made to law enforcement agents. 4 D.W. Louisell & C.B. Mueller, *Federal Evidence* § 427 at 348 (1980). *See also Urbanik, supra.*

The government's theory in the present case is that Sophia Floyd's statements to Detective Atkins were made as part of a deliberate cover-up and thus furthered the conspiracy's objective of remaining in business. *See United States v. Fahey,* 769 F.2d 829 (1st Cir. 1985) (statement to FBI agent by coconspirator admissible if intended to mislead the agent); *United States v. Diez,* 515 F.2d 892 (5th Cir.

1975), *cert. denied,* 423 U.S. 1052 (1976) (statement to IRS agent by coconspirator admissible when the statement was "deceptive in design"). The problem with this theory by the government is that it is sheer speculation. The record is conspicuously devoid of any evidence of a cover-up. The only support the government can find for its position is the fact that Sophia Floyd initiated the relationship with Atkins and that she always avoided inculpating herself in her reports. Even under the most liberal interpretation of the "in furtherance" provision, Sophia Floyd's statements cannot be construed as furthering any objective of the conspiracy. There is no indication that she tried to lead the investigators away from the conspiracy. To the contrary, she led them *toward* the conspiracy and ultimately brought about its demise. Although she withheld information from Atkins about her own involvement in the conspiracy, this is run-of-the-mill behavior for police informants, and such withholding does not automatically convert otherwise reliable statements by informants into attempts to mislead or deceive the investigators.

Although we can find no factually similar case in any jurisdiction, our conclusion is in line with several other cases in which a coconspirator's statement was held inadmissible under Rule 801(d)(2)(E). *See, e.g., United States v. Lang,* 589 F.2d 92 (2d Cir. 1978) (statement to Secret Service agent by distributor of counterfeit bills that one of the distributor's previous customers [the defendant] had been arrested while possessing such bills did not advance any venture in which the defendant had an interest); *United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976) (statement by coconspirator made in an effort to secure the release of a friend from prison did not further the conspiracy because the declarant "was working on a 'frolic' of his own"). Sophia Floyd's statements advanced only her

private interests, and were to the detriment of the other defendants.

Sophia Floyd's hearsay statements were used at trial against appellants Moates, Eire, and Neely. As to Moates and Eire the improper admission of the statements was harmless because there was overwhelming untainted evidence of their participation in the conspiracy and their use of the telephone in furtherance of illegal drug activities. *See United States v. Urbanik,* 801 F.2d 692 (4th Cir. 1986). As to appellant Neely, however, the improper admission requires that we grant him a new trial. The only other evidence presented against Neely was three intercepted telephone conversations that allegedly referred to drugs in code. Because the government sought to develop the meaning of the code at least in part by the use of information contained in the inadmissible statements, we cannot say that their admission was harmless as to him. This does not mean that on the retrial the government is foreclosed from developing, through other testimony, the meaning of the alleged code used in the intercepted conversations.

V.

Appellant Eire contends that the court erred in failing to sever his trial from that of the other defendants because he was not present during jury selection. Although Eire was advised of his right to be present at jury selection he apparently decided, after discussion with counsel, to remain in Florida during jury selection. Because of his absence the court ordered severance of his trial. After further discussing with counsel Eire moved to allow waiver of his presence at jury selection. The court questioned Eire closely, granted the motion to waive, and withdrew the severance. Eire now contends that the court erred in allowing him to waive this right and denying him a separate trial, but he

offers no cogent reason why the court erred. In *Parker v. United States,* 184 F.2d 488 (4th Cir. 1950), we held that the right to be present at jury selection is waivable except for capital offenses. The record shows that Eire's waiver was made intelligently, understandably, and knowingly, and thus the court's allowance of waiver was not erroneous.

VI.

Finally, appellant Neely argues that Judge Anderson erred in failing to disqualify himself at Neely's sentencing hearing. The presentence report revealed that Judge Anderson had represented Neely 18 or 21 years earlier while he was in private practice. Neely at that time had been accused of murder and, with counsel from Anderson, had agreed to plead guilty to manslaughter. Judge Anderson disclosed to both parties his prior representation of Neely and noted that he had no independent recollection of Neely or the case. Neely made no objection to Judge Anderson proceeding with sentencing. Given Judge Anderson's full disclosure, the absence of actual impropriety, and Neely's failure to request recusal, *see United States v. Sartori,* 730 F.2d 973 (4th Cir. 1984), we find no reversible error in Judge Anderson's failure to disqualify himself.

In summary, we affirm the judgments of convictions of appellants Moates, Eire, Benae Floyd, and Sophia Floyd. We vacate the judgment of conviction of appellant Neely and remand for a new trial.

AFFIRMED IN PART.
VACATED AND REMANDED
IN PART.